1980

The State of Utah v. Nathan J. Hill : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

NATHAN J. HILL,

Defendant-Appellant.

BRIEF

APPEAL FROM THE
DISTRICT COURT
COUNTY, STATE
MERRILL,

ROBERT J. SCHUMACHER

Utah County Legal Defender
Association, Inc.
107 East 100 South
Provo, Utah 84601

Attorney for Appellant

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 17234
NATHAN J. HILL,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted on two counts of burglary in violation of Section 76-6-202, Utah Code Annotated (1953), as amended, pursuant to a plea of admission made in the Third District Juvenile Court in Utah County on the 30th day of January 1980, the Honorable Merrill L. Hermansen, judge presiding. Specifically the charge was unlawfully remaining in a building with the intent to commit theft.

DISPOSITION IN THE LOWER COURT

On April 16, 1980 appellant made a motion to withdraw and change his plea of admission, on the sole ground that he entered the admission without the assistance of counsel.

His motion was denied on May 20, 1980 by Judge Hermansen. On the same date Judge Hermansen ordered appellant to pay $50.38 and committed him to the Youth Development Center. However, the committment was stayed on the condition that appellant take a job and pay $100 per month restitution. In addition, appellant was placed in the control of the Division of Family Services.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of appellant's conviction, as well as affirmance of the Order denying the motion to withdraw appellant's plea of admission.

STATEMENT OF THE FACTS

At the outset it must be noted that the proceedings on January 30, 1980, when the appellant's plea of admission was made and entered, was not recorded and thus no transcript of those proceedings is available for this appeal. Rather, the juvenile court judge has provided a memorandum dated June 1980, recounting what occurred at the proceedings. The record on appeal contains this memorandum, certain minute entries of the court, the court's findings of fact and decree, the juvenile court petition, and the appellant's motion for change of plea accompanied by an affidavit of the appellant's father, and from these documents the following statement of facts is made:

On January 30, 1980, appellant, accompanied by his father and his probation officer, came before Judge Hermansen in the Third Judicial Juvenile Court pursuant to charges that he had remained in the offices of Dr. Robert J. Peterson and Dr. Larry J. Broadbent with the intent to commit theft in violation of Section 76-6-202, Utah Code Code Annotated (1953), as amended. The charges against appellant were read and explained. Although the exact title and section of the Utah Code was not read orally at the proceedings, appellant and his father were previously made aware of the title and section of the Utah Code charged in the summons, which had been previously served on them. Judge Hermansen informed appellant and his father that appellant had a right to consult with counsel before entry of the plea, and that the charges against appellant were very serious. Appellant indicated that he did not wish to consult legal counsel. The judge then asked the appellant's father whether he felt that the decision to waive the right to legal counsel was a good and prudent decision and the father expressly supported the decision. The judge did not instruct the appellant as to the possible consequences of pleading an admission to the charge but again advised that it was a very serious charge. Based upon these facts, the judge concluded that the right to counsel had been knowingly

waived and accepted the plea of admission.

On April 16, 1980, appellant filed a motion for change of plea on the sole ground that he had entered his admission without the assistance of counsel. In an affidavit of appellant's father, attached to the motion, it was alleged that the father understood the charges to be in the nature of a trespass rather than burglary based on conversations he had earlier had with appellant's probation officer and that admission to the charge with other charges was necessary in order to clear the record and place appellant in the "Tracker Program." The father further alleged that based on this understanding, he advised his son to admit all of the charges. The father finally alleged that after the January 30, 1980 hearing, he discovered the evidence in the case and believed that his son did not commit burglary but rather criminal trespass. After a hearing on this motion, Judge Hermansen denied the motion on May 20, 1980, having concluded that he had fully advised appellant and his father of their rights to an attorney and that they had knowingly waived the right to counsel prior to entering the admission to the charge. The Court then entered an order that appellant pay $50.38 restitution and that he be committed to the Youth Development Center with that order stayed on the condition he take a job and pay $100.00 a month towards restitution, and that appella

be placed in the care, custody, control and guardianship of the Division of Family Services for appropriate placement.

ARGUMENT

POINT I

DUE PROCESS DOES NOT REQUIRE THAT AN INDIGENT JUVENILE BE AFFORDED COUNSEL IN A DELINQUENCY PROCEEDING WHICH DOES NOT RESULT IN HIS CONFINEMENT.

The sole issue raised by appellant on appeal is that the waiver of his right to counsel prior to the entry of his plea of admission was neither voluntarily nor intelligently made and therefore the juvenile court erred in denying his motion to withdraw the admission.

Respondent submits that since appellant did not receive a sentence of incarceration as a result of his plea of admission, he may not be heard to complain that he was denied his right to counsel at the juvenile court proceedings.

A juvenile's right to counsel in a delinquency proceeding was established in In Re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 528 (1967). The Gault decision followed two Supreme Court decisions, which established that defendants in criminal proceedings charged with capital crimes or felonies have a constitutional right to be represented by counsel. Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); Gideon v. Wainwright, 372 U.S. 335, 83

S.Ct. 729, 9 L.Ed.2d 799 (1963). However, the scope of a juvenile's right to counsel in a delinquency proceeding was limited by Gault to proceedings where there is a risk of confinement. The Court in Gault stated:

> We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. 875 S.Ct. 1451.

The direction that this area of the law has taken in criminal proceedings in recent years establishes a pattern which is helpful in determining the scope of a juvenile's right to counsel. In the case of Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), the Supreme Court extended the right to counsel to any criminal proceeding where the defendant may be incarcerated. However, Argersinger appeared to leave open the question of whether an indigent in a criminal proceeding had a right to counsel where he was not, in fact, incarcerated. This question was answered in Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). In Scott, the defendant was convicted of theft. The applicable Illinois statute set the maximum penalty for the offense as $500.00 fine or one year in jail or both.

The defendant was convicted without the assistance of counsel and fined $50.00; whereupon he appealed, claiming he had been denied the right to counsel. The Supreme Court held:

> . . . the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense. 99 S.Ct. 1162.

Thus, the right to counsel in criminal proceedings does not extend to proceedings which do not result in the confinement of the accused.

The Court in Scott reasoned there was a sound basis for drawing the line between those proceedings which result in confinement, and those where there is only a risk of confinement such as a fine. The Court stated at 99 S.Ct. 1162 that "Actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment."

Respondent asserts that the Scott decision and the analysis contained therein have application to juvenile proceedings. Because the considerations, stated above, upon which the Scott decision was based are analogous to the considerations present in juvenile proceedings, respondent asserts that the Scott decision should be followed in establishing the scope of the right to counsel in juvenile proceedings. Respondent submits that the due process clause of the

constitution only requires that no indigent juvenile be confined unless the state has afforded him the right to counsel.

In the instant case appellant was charged with delinquency based on two felony counts of burglary in violation of section 76-6-202, Utah Code Ann. (1953), as amended. On January 30, 1980, appellant made a plea of admission to the charge. As a result of appellant's conviction he was ordered to pay restitution of $50.38 and he was placed in the care of the Division of Family Services. The order to be placed in the Youth Development Center was stayed. Therefore, because appellant was not confined he was not denied due process by pleading guilty without the assistance of counsel.

POINT II

THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE APPELLANT HAD EFFECTIVELY WAIVED HIS RIGHT TO COUNSEL.

Section 77-24-3, Utah Code Ann. (1953), as amended, provides that the Court anytime before judgment may withdraw a plea of guilty and substitute in a plea of not guilty. (See also Section 78-3a-46, Utah Code Ann. (1953).) However, this section does not give a defendant an automatic right to withdraw his guilty plea, but places the decision within the

sound discretion of the trial court. State v. Forsyth, 560 P.2d 337 (Utah 1977); State v. Olafson, 567 P.2d 156 (Utah 1977). This Court in Forsyth stated "the trial judge is allowed considerable latitude in the exercise of that discretion, which the appellate court will not interfere with unless it plainly appears there was an abuse thereof." Id. at 339. The facts of the instant case do not demonstrate that the trial court abused its discretion in denying the appellant's motion to withdraw his guilty plea.

First, appellant was properly instructed on his right to counsel and he effectively waived that right. It is well-settled that the right to counsel in a criminal proceeding can be waived by the defendant. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Von Moltke v. Gillies, 322 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1947). The waiver of a juvenile's right to counsel in delinquency proceedings was established in Utah in State v. Spiers, 12 U.2d 14, 361 P.2d 509 (1961). Johnson, supra, stated that whether a waiver has been effective in criminal proceeding depends upon the facts and circumstances of each case including background, experience, and conduct of the accused.

In Spiers, this Court likewise applied this standard to juvenile proceedings. Even though there is a presumption against waiver of the right to counsel, both Johnson and Spiers

placed the burden on the defendant to establish he did not effectively waive his constitutional rights. The Court in Spiers stated: "the burden is on the defendant to show he has been denied his constitutional rights." Id. at 511.

As already indicated, this Court in Spiers stated that the issue of whether there has been an effective waiver of the right to counsel depends upon the facts and circumstances of each case. In Spiers this court indicated that three of those factors were background, experience and conduct of the accused. The Arizona Supreme Court in Suiter v. Kurtz, 1 Ariz. App. 348, 403 P.2d 3 (1965), reviewing a 14 year old juvenile's waiver of counsel, considered the following factors: age, education, literacy, prior courtroom experience, financial condition, mental state, inducements, haste in proceedings, absence of relatives, complexity of charge, and knowledge of legal procedure.

All of these factors should be considered in answering the question of whether appellant intelligently and voluntarily waived his right to counsel. Moreover, the burden is on the appellant to establish that in view of all these factors his waiver was ineffective. Appellant in his brief only focuses on his age, his father's understanding of the charges and the effect of pleading guilty, and the court's

instructions at the time the plea was made.

Appellant recognizes that a juvenile can waive his right to counsel. However, he cites Williams v. Huff, 146 F.2d 867 (D.C. Cir. 1945), which states that where the defendant is a juvenile, a rebuttable inference is created that the waiver of counsel is not intelligently made. In the instant case that inference is rebutted by the fact that appellant's father, who was present when the plea was made, concurred with his son that they did not want to consult with counsel.

Appellant also claims that his father misunderstood the charges. However, it appears there is no objective proof to support this claim. The only evidence that appellant's father misunderstood the charges is the father's unsupported affidavit. Appellant further claims that his probation officer told his father that admission of the charges would clear the record and expedite the placing of appellant on the Tracker Program. However, appellant does not claim that this advice was incorrect or improper. These facts indicate that caution should be used in assessing the reliability of appellant's assertions. The New Jersey court in In Re State The Interest of R.M., 105 S.Ct. 372, 252 A.2d 237 (1969), stated that they would find that a juvenile had effectively waived his right to counsel if they were satisfied from the

circumstances that "(1) defendant knew he had a right to counsel; (2) he failed to avail himself of that right with a full understanding of the implications and consequences of a plea of guilty; (3) he nevertheless submitted the plea entirely voluntarily."

The facts of the instant case satisfy these requirements. On January 30, 1980, the day appellant pled guilty, he was fourteen years and 9 months old. Present with the appellant were his father and his probation officer. The charge against appellant was read and then the Court explained to him what the charges were. The court informed appellant and his father that he had a right to counsel. However, they indicated to the Court that they did not wish to consult counsel even after the court questioned them as to whether this decision was advisable.

Finally, appellant makes no claim that due to lack of mental capacity or education he did not understand the proceedings, nor does he claim that fear, stress, or any other inducements influenced his decision to plead guilty. In short, appellant knew he had a right to counsel, and there is no evidence to show that appellant's plea was not intelligently and voluntarily made.

Respondent asserts that appellant has not met his burden of showing that he did not waive his right to counsel

intelligently. The juvenile judge, who was in a position to know whether appellant's waiver of counsel was intelligently made, concluded that it was and denied appellant's motion to withdraw his guilty plea. Absent a clear showing that the trial court abused its discretion in denying appellant's motion, the denial should stand.

Finally, appellant adds the additional argument that his waiver of his right to counsel was unknowingly made because the juvenile court judge did not advise him of the maximum possible penalty he might receive if he pled guilty. It must be stressed that appellant does not assert that his plea was involuntarily and unintelligently made on this basis. Rather he limits his claim to the waiver of counsel issue. Indeed, the right to counsel question was the only basis of appellant's motion to withdraw his plea in the court below. When viewed in this context, respondent re-asserts that because the maximum penalty of incarceration was not assessed in this case, appellant's right to counsel was not violated. Moreover, appellant's cases, to wit, State v. Banford, 13 U.2d 63, 368 P.2d 473 (1962) and Von Moltke v. Gillies, 322 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1947), become distinguishable. Although these cases establish that before a guilty plea can be accepted the Court must explain what the consequences of making that plea are, nevertheless,

there are notable differences between the instant case and Von Moltke and Banford, which operate against allowing appellant to withdraw his plea on that ground. In Banford and Von Moltke the defendants, after entering their guilty pleas, were sentenced to prison terms. Here appellant was only ordered to pay $50.38 restitution. Imprisonment is a penalty different in kind from a fine. A fine does not involve the serious intrusion into the life of the accused that imprisonment does. Where the accused may be imprisoned as a consequence of pleading guilty, it is critical that he be aware of that possibility because of the substantial impact imprisonment would have on his life. His awareness that he may be confined may substantially influence his decision to plead guilty. In the instant case, where appellant was ordered to pay $50.38, and make restitution, there has not been a substantial intrusion into his life.

The Court in Von Moltke stated that before a judge could discharge its duty the judge must investigate as long and as thoroughly as the circumstances in the case demanded. The facts in Von Moltke demanded that the judge make a comprehensive and penetrating examination of all the circumstances in the case. In the instant case, where appellant was aware of the consequences of pleading guilty, the judge

discharged his duty by reading and explaining the charges to appellant and the father and by informing them of their right to counsel.

CONCLUSION

Respondent submits that, where appellant was not confined as a result of his conviction, he was not denied due process by pleading guilty without the assistance of counsel. However, if this Court finds appellant did have a right to an attorney, respondent submits that an examination of the circumstances at the time appellant pled guilty shows his waiver of his right to counsel was intelligently and voluntarily made.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent